

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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& proof of service

76-1153

To be argued by
JESSE BERMAN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

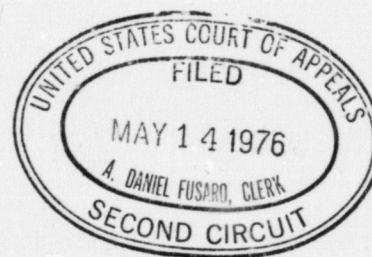
Appellee, :

- against - :

Docket No. 76-1153

CECIL ROBINSON, :

Appellant :



-----X
BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF CON-
VICTION RENDERED IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Appellee, :
-against- :
CECIL ROBINSON, :
Appellant. :
-----X

ISSUES PRESENTED

1. Whether the Court erred in admitting the July 25 gun, because its prejudicial effect far outweighed its probative value, and because the Ravich case discourages, rather than permits, such evidence in a case where the proof is far from overwhelming. Also, whether the Court's charge on the gun was too vague to be of any assistance to the jury or to assure that the jury did not misuse such evidence.
2. Whether the failure of the government to disclose that Simon and Brown had met and that Garris had also been present permitted the prosecutor to argue a powerful untruth in his summation, to wit, that only appellant knew Brown. Also, whether the mid-deliberations stipulation failed to cure this injustice, for appellant remained deprived of his rights to develop and confront these late-revealed facts and his right to argue from such facts.
3. Whether the prosecutor's summation improperly shifted the burden of proof to appellant on the issue of alibi.
4. Whether the Court erred in not promptly revealing to counsel the content of the juror's note and in not answering the juror's inquiry.
5. Whether the gun, seized incident to appellant's arrest, should have been suppressed, because the complaint/affidavit in support of the arrest warrant did not establish probable cause to arrest appellant.

STATEMENT PURSUANT TO RULE 28(a) (3)

A. Preliminary Statement:

This appeal is from a judgment of the United States District Court for the Southern District of New York (Bryan, J.), rendered March 5, 1976, convicting appellant, after trial by jury, of the crime of bank robbery [18 U.S.C. §2113(a)] and sentencing him to twelve (12) years imprisonment.*

Timely notice of appeal was filed and this Court, on April 6, 1976, appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Appellant is presently incarcerated pursuant to the judgment herein.

B. Statement of Facts

On May 16, 1975, the 177 East Broadway branch of the Bankers Trust Company was robbed by four men. Three of the robbers can be seen in the bank surveillance films: (1) a man dressed in black, wielding a shotgun, (2) a man dressed in a white coat, wearing glasses, and (3) a man dressed in a shorter white coat, wearing a hat (T-II.67-68). The fourth robber remained near the door, out of the range of the camera, and does not appear in the bank

* Appellant was tried twice on this indictment.

His first trial, on November 20, 24, 25, 26, 28 and 29, 1975, ended in a declaration by the Court of a hung jury and a mistrial. The minutes of that first trial will be referred to as T-I.1a through T-I.45a (morning session, 11/20/75) and T-I.1 through T-I.462.

Appellant's second trial, on January 21, 22, 26, 27, 28, 29 and 30, 1976, will be referred to as T-II.1 through T-II.1049.

Pre-trial conferences were held on October 24, 1975, January 8, 1976 and January 19, 1976.

surveillance film.

The robbers made their escape, and none of the weapons were ever recovered, nor was any of the approximately \$10,000, which was taken from the bank, ever recovered.

On June 17, 1975, Allen Simon was arrested and charged with the instant bank robbery.

On June 27, 1975, Simon was indicted (75 Cr.635) for his participation in the instant robbery. Simon's three-count indictment charged him with bank robbery, armed bank robbery, and use of a firearm (the shotgun) in the commission of the robbery.

On August 19, 1975, Simon pleaded guilty, before Judge Duffy, to counts 1 and 3 of his indictment, and on September 18, 1975, Judge Duffy sentenced Simon to eighteen (18) years imprisonment.

Meanwhile, on July 25, 1975, 10 weeks after the bank robbery, appellant Cecil Robinson was arrested and charged with this bank robbery. The government's theory was that appellant was the robber in the white coat and hat in the surveillance photos. When arrested on July 25, appellant was allegedly in possession of a gun.

On August 4, 1975, appellant was indicted, together with Edward Garris, for conspiracy to rob this bank (count 1), for robbing the bank (count 2), and for using arms while robbing the bank (count 3).*

(1) The First Trial

Appellant pleaded not guilty, and his first trial (November 20-29, 1975) before Judge Duffy, ended in a hung jury, with the final vote at 8-4 in favor of conviction.

* Simon, who did not testify in the grand jury, was named as an unindicted co-conspirator.

At that first trial, the government was represented by Mr. Hoskins, who attempted, unsuccessfully, to persuade Judge Duffy to allow the July 25 gun into evidence. The government's initial theory for offering the gun was that it showed consciousness of guilt:

MR. BERMAN: Mr. Hoskins told me that the theory upon which - I will try to state this as fairly as I can - upon which he intended to offer this gun, is to demonstrate, I suppose, consciousness of guilt in that when the officers didn't identify themselves as officers, Mr. Robinson allegedly made some move to take this gun out of the bag that it was in.

I think that is a fair statement of the theory.

THE COURT: Is that accurate?

MR. HOSKINS: Yes, that is accurate.

(Pre-trial Conference of 10/24/75, p.11)

Judge Duffy noted that the government was "going to have a hard time getting that in" (id.).

On the morning of the first day of the first trial, the government shifted its theory on the admissibility of the July 25 gun: it now argued that the gun was probative of appellant's "opportunity or preparation to commit the crime charged" (Gov's. Memo on Gun, p.3). The government cited United States v. Ravich, 421 F.2d 1196 (2d Cir. 1970), where this Court found the admission of guns which were not necessarily involved in the crime harmless, given the other "overwhelming evidence" in that case. As to the instant case, however, the government conceded that:

Far from its case being overwhelming, the government cannot produce a single bank employee or bank customer witness who can identify the defendant as one of the robbers.

(Memo, supra, p.3)*

* See also, Hoskins' statement at T-I.45a, that the government's case "is not overwhelming".

Judge Duffy observed that:

I am here to try a bank robbery case, not
a Sullivan Law violation.

(T-I.3a)

Appellant also sought to suppress the July 25 gun on the theory that it had been seized incident to appellant's arrest, which had been pursuant to a warrant, and appellant argued that the complaint/affidavit in support of that warrant did not establish probable cause to arrest appellant (T-I.4a-10a). The motion to suppress was denied (T-I.9a).*

Later that day, after the first eight witnesses had testified, Judge Duffy ruled that the July 25 gun could not come into evidence (T-I.140).

At the first trial, the government claimed that the robber in the white coat and hat, visible in the background in some of the surveillance photos, was identifiable as appellant. Simon became a witness for the government and, in return for the government's support on his upcoming motion to reduce his 18-year sentence, Simon testified that appellant was the robber in the white coat and hat, that the robber in the white coat and glasses was "Kareem", and that Garriis was the robber by the door. It was also stipulated that one of appellant's fingerprints was found in the stolen getaway car, which had been abandoned by the robber and found by the police shortly after the robbery.

The defense produced Otis Brown, the owner of the stolen getaway car, who explained that appellant was a friend and schoolmate of

* The facts and arguments with respect to this motion to suppress the gun are set forth in appellant's argument, under POINT V ,
infra.

his and that appellant had been a passenger of Brown's, in Brown's car, on several occasions shortly before the car was stolen. The government's own FBI fingerprint expert testified that such a fingerprint might have remained in the car after having been placed there months before the robbery.

The government admitted that the revelation, at trial, that Brown knew appellant, "was a surprise" (T-I.327), but the government argued that Brown did not know Simon, Garris or "Kareem", and since appellant did know Brown, the car must have come to the robbers via appellant (T-I.327-328).*

The jury at the first trial deliberated for three days and ultimately hung, 8-4 for conviction.

(2) The Second Trial

Prior to the second trial (January 21-30, 1976), Simon, Simon's lawyer, and some third person all made Rule 35 applications to reduce Simon's 18-year sentence. Judge Duffy denied the third-person application, but reserved decision on the motions by Simon and Simon's lawyer. Appellant's re-trial was assigned to Judge Bryan, and appellant's counsel cautioned the government not to create the impression, at the second trial, that Simon no longer had a pending Rule 35 motion (Pre-Trial Conference of 1/8/76, p.31), which nonetheless was just what the prosecutor later attempted to do (T-II.463-467, 499-504, 506).

During the interval between the two trials, the government revealed that it had failed to disclose to the defense that photographs

* In fact, the government at that point already knew, from Simon, that Simon knew Brown prior to the robbery and that Garris had also seen Brown prior to the robbery. See POINT II, infra.

of 42 different individuals had been shown, prior to the first trial, to the various eyewitnesses, and that several of the witnesses had identified or chosen photos of several other suspects (other than appellant, Simon or Garris). Mr. Edwards, the Chief of the Criminal Division, who was in charge of the case just prior to the second trial, conceded that these facts "should have been turned over sooner" (minutes of 1/8/76, p.21). After a hearing on appellant's motion to dismiss, the Court found that "the material should have been turned over under Brady" and that the government had been guilty of "bad judgment" and "misjudgment" (T-II.152). The Court ruled, however, that "[t]he remedy in most cases of this nature is a new trial. The defendant is having a new trial", and it denied appellant's motion to dismiss the indictment (T-II.153).

At the final pre-trial conference (January 19, 1976), the government, now represented by Mr. Sagor, reviewed its attempt to offer the July 25 gun. Sagor claimed that he had "been able to develop recently further evidence" demonstrating for the first time that there was a .38 used in the bank robbery (Conference of 1/19/76, p.66). However, Sagor's only source for this allegedly recently developed evidence was Simon, and it was Simon who had, in fact, told precisely the same thing to Hoskins prior to the first trial.* Sagor argued that the July 25 gun should come in "to show that [appellant] was equipped to commit the very crime he was

* Government's Exh. 3556 at the first trial (Hoskins' notes of his interview with Simon) (3500 material) contained a statement that:

AE[Garris] - brought shotgun 20 gauge [and] .38

(T-II.385)

charged with" (Id. at 67). Appellant argued that Sagor was in effect asking Judge Bryan to reverse Judge Duffy's prior ruling on the same facts (Id. at 68). The Court reserved decision. On the first day of the re-trial, Sagor again sought to offer the July 25 gun, arguing this time that the bank robbery had been committed with "the same gun and weapon that Mr. Robinson had within about two months" (T-II.167-7), (emphasis added). Again the Court reserved decision.

Henry Kohn, the bank manager, testified that the bank was robbed at 9:55 a.m. on May 16, 1975. The robbery took less than 5 minutes; a gun went off, once, wounding Mrs. Aponte, a teller; \$10,122 was taken, \$750 of which (75- \$10 bills) was in marked bait money; none of the money was ever recovered. The surveillance camera did not begin operating until one minute after the shot had been fired. There were 10 employees and five or six customers present during the robbery.

Kohn saw three robbers: the one with the shotgun and the two with white coats. The robber with the white coat and hat wore gloves during the robbery, and the gloves were visible in the surveillance photos (T-II.238-240). Kohn said that the robber with the white coat and hat weighed 150-155 lbs, but Kohn said he could not identify him (T-II.242-3, 286-7).

Prior to the shooting and prior to the commencement of the robbery, while things were still calm, Kohn saw the robber with the white coat and hat seated on a chair near Kohn (T-II.797). but no law enforcement official had ever shown Kohn a photo of appellant (T-II.798). On June 12, 1975, FBI Agent McLaughlin, the case

agent, had shown Kohn some photo spreads, and it was stipulated that Kohn had chosen a photo of Carson Corley as "very strongly resembl[ing]" the robber with the white coat and glasses (T-II.801, 803), whom Simon had insisted was "Kareem".

Kohn never identified appellant.

Linna Lewis, a teller at the bank, testified that she saw the robber with the shotgun and the two robbers in white coats. Sagor tried, unsuccessfully, to get her to say that the robber in the white coat and hat was carrying a gun:

Q: Do you remember the differences, if any, between the two men that jumped over the counter? What one was wearing as opposed to the other, if you remember?

A: One was wearing a hat and the other one --

Q: Are these the three men that you remembered -- I'm forgetting what you said. Did you say one was carrying another gun?

MR. BERMAN: She didn't say that.

THE COURT: She did not. (T-II.392)

Richard Hall, another teller who never identified appellant, testified that he saw each of the four robbers (T-II.404-408) and that on May 21, 1975, Agent McLaughlin had shown him photo spreads aimed at each of the four robbers (T-II.411-2). Hall chose four photos, one for each of the four robbers, including someone whom he chose as resembling the robber in the white coat and hat (T-II.413, 419). No law enforcement official had ever shown him appellant or any photo of appellant (T-II.414-5).

Jarret Fishman Baumgarten, another teller who never identified appellant, saw the robber with the white coat for about ten seconds (T-II.431).

Eugenia Barone (called by the defense), another teller, testified that she never saw the robbery in progress: "I didn't see anything. I stayed facing the wall" (T-II.810). Nevertheless, on May 21, 1975, the FBI showed her photo spreads, told her to "choose anybody" (T-II.816), and she actually chose one suspect (not one of the defendants) as resembling the robber with the shotgun (T-II.814).

Gerald McGivney, (called by the defense) a bank officer eye-witness who never identified appellant, was shown photo spreads by the FBI, testified that he was never shown a photo of appellant (T-II.825).

Evan Lee (called by the defense), another teller who never identified appellant, testified that he saw the robbery happen (T-II.830), but that he was never shown a photo of appellant (T-II.834).

Wyman Li (called by the defense), an assistant manager eye-witness who never identified appellant, testified that he saw the robbery take place (T-II.836), but that he was never shown a photo of appellant (T-II.847).

heard the robber with the shotgun call one of the other robbers "Tonto" (T-II.837).

Renele Gray could not be located, but it was stipulated that she was a customer in the bank and a witness to the robbery, and that on June 12, 1975, Agent McLaughlin showed her a photo spread from which she chose Carson Corley as "very closely resembling" one of the robbers who wore a white coat (T-II.854-5).

Police Officers Ring, Branfine and Doriand established that

Brown's car, the getaway vehicle, was found at Avenue A and East 10th Street, 20 minutes after the robbery.

FBI Agent Michael Kilgallen dusted the car for fingerprints and lifted one of appellant's prints from the right rear cigarette lighter panel (T-II.317), and four of Garris' prints from parking tickets and Black Muslim literature found in the car (T-II.324).

Otis Brown (called as a government witness at the re-trial), identified the getaway car as his own car. Brown was a lab technician at Harlem Hospital and student in medical technology at Bronx Community College, as part of a work-study program run by the Public Service Careers Program [PSCP]. He had met appellant in PSCP in 1974 and the two had worked together at Harlem Hospital for about a year (T-II.341-2). Brown denied ever seeing Garris, and did not know anyone by the name of Allen Simon (T-II.353-4).

On May 16, 1975, Brown learned that his car had been stolen; he had never given the keys or permission to anyone.

Appellant had ridden with Brown in Brown's car, to and from Bronx Community College, about half a dozen times in April and May of 1975, prior to May 16, 1975 (T-II.346-8, 354). Brown and appellant were both in the same trainee program in PSCP in the spring of 1975, both definitely attended Bronx Community College together that spring (T-II.349, 351, 356-7). At some point during that spring, appellant was transferred from his job at Harlem Hospital to a position at Gouveneur Hospital. After that date, Brown continued to give appellant rides from Bronx Community College, dropping appellant off at appellant's home on a number of occasions (T-II.349, 350, 355). On several occasions, when there

were other passengers in the car, especially women passengers, appellant would ride in the back seat (T-II.361-2, 364).

FBI Agent Charles Bookstein, the government's fingerprint expert, testified that on August 18, 1975 he made the identification of appellant's print on the right rear cigarette lighter panel of Brown's car (T-II.366-7).

Bookstein could not determine how long prior to May 16, 1975, appellant's print had been placed there (T-II.368). Bookstein testified:

There is no scientific means to determine the age of a latent, that is, how long the particular print was on a particular surface.

(T-II.367).

Q: Assuming nobody tried to clean off a print and assuming nobody...covered it up, if we limit ourselves to temperature and dust conditions, on metal, a print like that could last two months in the spring?

A: It's possible, two months or longer.

(T-II.370-)

Q: If nobody brushed anything up against the print strongly enough to destroy it, in New York, in the spring, on metal, as we described it, and if no one made a deliberate effort to erase the print or smudge it, it may remain indefinitely, couldn't it?

A: That is possible, yes.

(T-II.371)

William D. Purcell, of the personnel department of Gouverneur Hospital, testified that appellant worked a three-day-a-week schedule at Gouverneur Hospital from April 11, 1975 until June 16, 1975 (one month after the robbery) (T-II.451). Appellant was

absent from work on May 15 and 16, and was present on May 20, which was his next required workday, and was present all three work days of the following week (T-II.452-5).

Purcell confirmed that appellant was in the work study program, working part-time and going to school part-time. The entry "registration" for the last day of the work week of June 10 indicated that appellant had gone to register at school for summer classes (T-II.457).

Allen Simon, who had pleaded guilty to being the robber with the shotgun, testified against appellant, pursuant to a written agreement which Simon had worked out with Hoskins in November, 1975, after Simon had received the 18-year sentence (T-II.460).

Simon had weapons convictions in 1969 and 1970 and narcotics convictions in 1969. He had been a heroin and cocaine user and a heroin seller. He had in the past violated terms of his bail and of his conditional discharge. He had served 12 of the 29 years of his life in jails (including Sing Sing, Comstock, Green Haven, Rikers Island, the Brooklyn House of Detention, Dannemora, Leavenworth, West Street and MCC), and was, at the time of appellant's re-trial, serving the 18-year sentence imposed by Judge Duffy, with his Rule 35 motion still pending.*

He testified that appellant was the robber in the white coat and hat, that Garriss, who was known as "Allah Equality" ("AE"), was the robber near the door, and that the robber in the white coat and glasses was known to him only as "Kareem". Simon himself was known as "Arova".

* After appellant's re-trial, Judge Duffy cut Simon's sentence down to ten years.

Simon's position was that although the surveillance photos of the robber in the white coat and hat were "kind of hazy", someone who knew him could pick him out as appellant (T-II.671-2).

According to Simon, when the robbery was being planned, appellant had advocated using a demand note, rather than guns, while Simon argued for the use of guns and Simon's arguments prevailed (T-II.487). He testified that Garris had a .38 on the day before the bank robbery (T-II.528-9), but counsel has been unable to locate specific testimony that any .38 was taken into the bank.

Appellant did not know how to drive (T-II.489), but "Kareem" had a car which, it was agreed, would be used for the robbery. Although Simon had ridden in "Kareem"'s car, Simon claimed he did not know the make or the model or the year or which state the plates were from (T-II.492, 668). On May 9, 1975, however, a week before the robbery, "Kareem"'s car crashed and was abandoned. "Kareem" said he could get another car (T-II.521-532).

According to Simon, on the morning of the robbery, "Kareem" and appellant arrived with the getaway car. Simon denied having seen that car before or ever knowing its owner (T-II.537).

All four men entered the car, with appellant sitting in the left rear seat (T-II.537).

They went to pick up the shotgun. Appellant got out of the car, came back, and, on the way down to the bank, again sat in the left rear seat (T-II.543).

After the robbery, only Simon and Garris rode in the back of the car (T-II.547, 551).

It was "Kareem" who shot Mrs. Aponte, the teller (T-II.572). And it was "Kareem" who had obtained the white coats worn by the other two robbers (T-II.578).*

Uptown, after the robbery, each of the four men got a \$1,500 share, and "Kareem" took an additional \$4000 to buy a car for the four of them. "Kareem" departed and Simon claimed he never saw "Kareem" again (T-II.588, 562-3, 576).

Simon maintained that he had no idea what "Kareem"'s real name was, that he never knew "Kareem"'s address, or even which borough he lived in, that "Kareem"'s car had been a two-door, even though the robbers had wanted a four-door**, that although he told authorities that "Kareem"'s car was white and maroon and had been abandoned on a parkway in Queens on the night of May 9, the authorities were unable to find it (T-II.572-5). Simon insisted that he had no idea where "Kareem" was or what had become of the \$5,500 which he claimed "Kareem" had taken (T-II.576).

Simon was surprised when he received the 18-year sentence; it was more than he expected and he was not satisfied with his lawyer (T-II.605-6). His understanding of his deal with the government was that it would be up to Sagor to tell Judge Duffy whether he was satisfied with Simon's testimony (T-II.630-1).

Simon was arrested for the instant case on June 17, 1975. On that day, McLaughlin showed him surveillance photos of the robber with the white coat and hat. McLaughlin said, "That's

* The white coats were not hospital coats. They were butcher coats, and said "meat market" on them (T-II.579).

** Brown's car was a four-door.

Cecil Robinson". Simon said "No" (T-II.689, 698-9).

McLaughlin then showed Simon known photos of Garris and of Carson Corley,* and Simon denied knowing either of them (T-II.690). Then McLaughlin showed Simon a surveillance photo of the robber with the white coat and glasses and a mug shot of Corley and asked if they were both photos of the same person. Simon said they were not (T-II.690, 702-3). Simon testified that he did this to protect Corley, whom he claimed was innocent (T-II.704).

McLaughlin was the first to mention appellant's name, and Simon learned from this that the FBI was interested in appellant (T-II.699), and, after being confronted with a surveillance photo in which he saw himself, Simon decided to agree with McLaughlin that appellant was involved (T-II.691), but he did not implicate appellant when interviewed by an assistant U.S. Attorney later that same day (T-II.692). On the witness stand, Simon claimed that on June 17 he had told partially truth and partially lies (T-II.700).

Simon denied that "Kareem" was really Carson Corley and that he was trying to protect a guilty Corley (T-II.705). He acknowledged that the first time he ever admitted his own participation was when he told McLaughlin that Corley, whom he claimed he did not know, was not involved in the robbery, but Simon insisted that he implicated himself to protect an innocent Corley, whom he did not even know (T-II.706).

Harvey Erdsneker, registrar of Bronx Community College, testified that the spring term ran from February 4, 1975 to May 21, 1975, followed by exams from May 22 to May 29 (T-II.721).

* Corley, a convicted bank robber, had been named in the instant
-16- (footnote continued on following page)

(footnote continued from preceding page)
bank robbery by 2 FBI informants (T-II.44-7). His mug shot was chosen, from a photo spread, by the eyewitnesses Hall, Kohn, Gray and Lee (T-II.76-80). Corley's Federal parole officer said that the surveillance photo of the robber with the white coat and glasses very closely resembles Corley (T-II.85-6). Corley was arrested the same day as Simon and was charged with the instant bank robbery. He was later released, based partially on Simon's failure (or refusal) to identify him (T-II.54)

Appellant was enrolled in the medical lab technology program; and was registered for four courses. He had classes on Mondays and Wednesdays, from 12:10 p.m. to 9:30 p.m. Appellant and Otis Brown were registered together in the spring of 1975 in the same writing course, which was the last class on Monday and Wednesday evenings (T-II.761).

The Court heard more argument on the question of the July 25 gun. Appellant noted that the July gun had never been linked to the bank robbery, that there were literally millions of .38's in existence and that the prejudicial effect of the gun was devastating. Since the government's theory was apparently that the July gun showed only access to guns or opportunity to commit the crime, appellant's counsel stated that:

I am willing to give the Court on the record my representation that I will make no...argument in summation to the effect that Mr. Robinson couldn't do the bank robbery because he had no access to guns.

(T-II.753)

Judge Bryan decided to let the July 25 gun into evidence.

Detective Clyde Foster, of the New York Police Department, testified that on Friday, July 25, 1975, he arrested appellant at the personnel department of Couvener Hospital, while appellant was receiving his paycheck. After moving appellant ten steps over to a wall and frisking him, Foster looked back to where appellant had been and saw a vinyl case on the floor (T-II.777). Inside was a .38 Colt with 2 live bullets (T-II.764).

Appellant had only \$6.30 in his possession and weighed 140 lbs. (T-II.768-9).

Carolyn Garcia, employed by the Human Resources Administration and formerly the coordinator of PSCP, testified that appellant knew Garris (T-II.776).

Joseph Blackwell, also employed at HRA, testified that appellant knew Garris (T-II.788-9).

(3) The Prosecutor's Summation

The strongest argument in Sagor's summation - the one which appeared to be irrebuttable - was that since appellant was the only one who knew Brown, it was too much of a coincidence to believe that Brown's car had been stolen, by coincidence, by someone other than appellant, and that the only logical conclusion was that appellant had stolen Brown's car:

You have heard Mr. Brown's testimony that he didn't know Mr. Simon. He said he never saw him before.

(T-II.884)

The important thing here is, which of Simon's friends knew Otis Brown? Mr. Brown told you who. It was Mr. Robinson.

(T-II.904)

Who knew about [Brown's] car? That's the point. Robinson had the getaway car or knew about the getaway car.

You know, out of all the stolen cars that occur in the City of New York...this particular car was used in the bank robbery...That is not a sheer coincidence. That's an impossible coincidence.*

(T-II.905)

* The argument was a strong one, but it was simply not true. Unknown to the Court, the jury or the defense, Simon had already told the government that he had twice met Brown and that on one of these occasions Garris had been present (T-II.1022-3). This was not revealed until the second day of jury deliberations.

Sagor, however, bolstered up this argument with a series of improprieties in his summation:

You will note that there was no alibi presented in this case--*

MR. BERMAN: Objection, your Honor.

THE COURT: Let us not talk about that at all. The jury will disregard that as having nothing to do with the case, not a thing.

(T-II.887)

He vouched for Simon's credibility by giving the false impression that Judge Bryan had believed Simon:

You know [Simon] is not going to say something here and expect to be rewarded by Judge Duffy if it isn't true, Judge Duffy, who will know from Judge Bryan what happened in this courtroom.

MR. BERMAN: Objection.

THE COURT: No; I think you better not go into that.

(T-II.895-6)

He argued that appellant could not shake Simon's story, even with the benefit of his attorney, who "is an expert cross-examiner" (T-II.899).

He made a thinly-veiled comment on appellant's not having testified:

Ladies and gentlemen, in this case if for one minute Mr. Robinson admits...to [his] being in the [bank surveillance] picture...then he can no longer deny it.

(T-II.900-1)

* Sagor well knew that this comment was improper, for he himself had said, at the last pre-trial conference, that:

It is unethical for me to argue that you didn't contest something as if you had a burden to contest it. The Court of Appeals has said that defense counsel has no burden at all to say or argue anything.

(Minutes of 1/19/76, p.60)

Appellant's motions for a mistrial were denied (T-II.90 -8, 981).

(4) The Court's Charge on the Gun*

Appellant objected to the Court's proposed charge on the July 25 gun (T-II.869, 873) and took exception after the Court gave it (T-II.1014).

The Court charged simply that:

It may be considered only for whatever value, if any, it has on the issue of defendant's identity as one of the robbers...

(T-II.1007)

Appellant argued that this was too simple, that it permitted the jury do find that appellant had used the July 25 gun in the bank robbery, and that the Court should have charged, instead, that the July 25 gun might prove "access to guns" (T-II.870).

(5) The Developments During Deliberations

Deliberations began on January 28, 1976. Later that afternoon, the jury asked to have read to it Blackwell's testimony on the friendship between appellant and Garris, and Brown's testimony on his knowledge of Garris (T-II.1017).

(Obviously, if the jury had either believed Simon's direct testimony that appellant robbed the bank with him, or had been convinced that appellant was in the surveillance photos, there would have been no need for this request, or for the ones that followed, or for lengthy deliberations.)

On the morning of the second day of deliberations, Sagor revealed that, prompted by the jury's request of the previous

* The entire text of the charge on the gun is at T-II.1007, and is reproduced in Appellant's Appendix as part of Item C.

day and by prodding from appellant's counsel he had phoned Simon that previous night (January 28). Simon told Sagor that he had indeed met Brown, at Harlem Hospital, in late 1974 or early 1975, when Brown was introduced to him not as Brown, but as "Hakim", and when Simon was introduced only as "Arova". Simon also saw Brown on another occasion, and Garris was present on one of those two occasions (T-II.1022).

Moreover, Simon said that he had previously told this to Sagor.

Sagor also revealed that during appellant's first trial, Simon had seen Brown, in the courthouse, while McLaughlin was present, and that Simon at that time had told McLaughlin that he had met Brown at the hospital (T-II.1023-4).*

Appellant moved for a mistrial, arguing that these facts were exculpatory to appellant, in that they negate the government's argument that he was the sole possible link to Brown and, thus, to Brown's car, and that the government had had a duty to inform the defense of these facts prior to the trial (T-II.1024-5). The motion was denied (T-II.1027).

The government offered to make a mid-deliberations stipulation, and appellant, in view of the denial of his mistrial motion, agreed (T-II.1028, 1030). Meanwhile, the jury asked to have all the fingerprint testimony re-read (T-II.1031).

The Court refused to give any instruction to the jury or to give either side's proposed stipulation, or to allow anything other than a mutually-agreed stipulation. Appellant was thus forced to agree to the government's version of the stipulation, which

* McLaughlin had been seated with Sagor throughout the re-trial (T-II.1). As Sagor himself noted in summation, "he is the FBI agent at my right" (T-II.890).

went to the deliberating jury (after the fingerprint testimony was re-read) as follows:

Counsel have stipulated that if Mr. Simon were recalled to the stand, he would testify that in late 1974 he was once introduced to Otis Brown by Robinson on the ground floor of Harlem Hospital. Simon was introduced as Arova, and the name "Simon" was not mentioned. Edward Garris was present at that introduction but was not introduced.

Simon would also testify that he saw Brown from a distance at Harlem Hospital on a subsequent occasion.

(T-II.1035-6)

The jury left the courtroom at 12:10 p.m., and at 3:25 p.m. it sent a note saying, "We are deadlocked..." (T-II.1030).^{*} Over appellant's objection, the Court announced that it would give an Allen charge and the jury was called in.

THE COURT: Is it your view, Mr. Foreman, that you are really hopelessly deadlocked?

THE FOREMAN: Yes, your Honor.

THE COURT: There would be no further hope in continuing your deliberations?

THE FOREMAN: I believe it will stay as it is, your Honor.

(T-II.1038)

The Court then gave an Allen charge.

At 5:45 p.m., a note (Court's Exh. 9) from a juror arrived. The Court ordered it sealed, without revealing its contents to counsel (T-II.1040, 1042).

At 6:30 p.m., the Court asked counsel what they wanted to do, and, unaware of the contents of the note, counsel agreed that deliberations should continue. The case was then adjourned to the following morning (T-II. 1040-1).

^{*} The note also contained the jury's vote, which the Court did not reveal.

At 9:45 the next morning, the Court told counsel only that the juror's note of the previous day was "with regard to her state of mind, as it were, and asking for advice." Appellant's counsel responded that, "without knowing what is in her note, I can't comment too intelligently..." (T-II.1042). The Court again gave an Allen charge (T-II.1043).

At 2:45 p.m. the jury found appellant guilty on Count 2.*

After the verdict, it was learned that in the sealed note of the previous day, the juror had written that she had a "strong reasonable doubt" and had asked the Court what she should do.

ARGUMENT

POINT I

THE COURT ERRED IN ADMITTING THE JULY 25 GUN, BECAUSE ITS PREJUDICIAL EFFECT FAR OUTWEIGHED ITS PROBATIVE VALUE, AND BECAUSE THE RAVICH CASE DISCOURAGES, RATHER THAN PERMITS, SUCH EVIDENCE IN A CASE WHERE THE PROOF IS FAR FROM OVERWHELMING. MOREOVER, THE COURT'S CHARGE ON THE GUN WAS TOO VAGUE TO BE OF ANY ASSISTANCE TO THE JURY OR TO ASSURE THAT THE JURY DID NOT MISUSE SUCH EVIDENCE.

A reading of the entire record of this case, including both trials and the various pre-trial conferences, clearly shows that the government was desperately trying to get the July 25 gun before the jury. They first argued that it showed "consciousness of guilt". Then they argued that it showed opportunity to commit the crime. Then they argued to the Court that it was indeed one of the guns used in the bank, although the Court ruled that there

* Counts 1 and 3 were then dismissed on appellant's motion, with the government not opposing.

was insufficient proof to permit such an argument.

Judge Duffy, after hearing argument and after reading the government's memorandum of law, refused to let the gun in. When the case was reassigned to Judge Bryan for the second trial, the government tried again. The conclusion is inescapable that the prosecution wanted the jury to hear that appellant was the type of man who would have a gun in his possession. As Hoskins had himself conceded in his memorandum, the case was far from being an overwhelming one. If the gun would come in, the government's case would be bolstered, because appellant's character would thus be discredited and the jury might take the proof of the crime of possession of a gun as proof of the crime of bank robbery ten weeks earlier. Especially if the Court, in its charge, failed to carefully instruct the jury on law to use so risky a piece of evidence. And, of course, that is just what happened.

It must be recalled that this case was a very close one. Even Simon described the surveillance photos of the robber in the white coat and hat as being "hazy", and Simon himself was a very impeachable witness, both in terms of his own character and because he had previously denied that appellant was involved and had only recently made a deal to get out from under a 18-year sentence.

That the case was a close one can also be seen from the fact that the first jury hung, 8-4, and from the fact that the second jury was out three days on a one-issue case and had reported itself to be hopelessly deadlocked, with at least one juror having a "strong reasonable doubt" and not knowing what to do.

The case was also close because Otis Brown's having previously

driven appellant in his car seriously undercut the probative value of the fingerprint, and because the surveillance photos showed that the robber with the white coat and hat wore gloves, and because Simon's testimony placed appellant in the wrong position in the car to leave his print on the right rear lighter panel that day.

Also, the July 25 gun, which came in at the second trial, but not at the first trial, was clearly the biggest evidentiary difference between the two trials, and appellant was not found guilty at the first trial.

The government argued, unsuccessfully with Judge Duffy and then successfully with Judge Bryan, that the gun should come in under United States v. Ravich, 421 F.2d 1196 (2nd Cir.1970). But a careful reading of Ravich shows that this Court, in Ravich, seriously discouraged letting in such potentially inflammatory evidence as weapons possessed on a later occasion, especially where the proof of guilt is far from overwhelming.

Ravich was "unhesitatingly identified" by five eyewitnesses (421 F.2d at 1198), not to mention the testimony of an accomplice, proof of flight to and apprehension in Louisiana and possession of large, unexplained sums of money. What this Court held in Ravich was merely that "in view of the overwhelming evidence that the defendants were the robbers", the Court had not abused its discretion in letting the guns in. (421 F.2d at 1204-5).

In the instant case, by comparison, there were no eyewitnesses who identified appellant. When arrested, appellant had only \$6.30 in his possession. Simon was, as previously noted, severely im-

peached and obviously neither he nor the surveillance photos readily persuaded either jury.

Even in Ravich, where the other evidence was overwhelming, this Court indicated that the wiser course "might well have" been to exclude the guns. 421 F.2d at 1204. In the instant case, where it seriously appears that the July 25 gun made all the difference, it was an abuse of discretion to let that gun in.

In addition, the failure of the Court to give a limiting instruction at the time the gun was received was plain error. United States v. Bobbitt, 450 F.2d 685 (D.C. Cir. 1971); United States v. McClain, 440 F.2d 241 (D.C. Cir. 1971); United States v. Apollo 476 F.2d 156 (5th Cir. 1973).

Moreover, the Court's charge on the gun was so vague that it really did not tell the jury how it could permissibly use that potentially inflammatory item of evidence:

It may be considered only for whatever value, if any, it has on the issue of defendant's identity as one of the robbers....

(T-II.1007, emphasis added)

It would appear from this Court's opinion in Ravich that a gun possessed ten weeks after a bank robbery, a gun which cannot be proven to have been used in the robbery, should usually not be received in evidence, and that on the rare and perhaps ill-advised occasions when a judge does let such evidence in, the theory by which it comes in, and the theory which the judge must charge is:

Direct evidence of such possession would have been relevant to establish opportunity or preparation to commit the crime charged....

Ravich, supra, 421 F.2d at 1204, emphasis added.

Appellant's counsel sought to avoid having the gun come in by promising, on the record, not to argue that appellant was a person who did not have access to guns. The Court did not accept this solution and chose to let the gun in, but the least it could have done was to tell the jury, as appellant requested, that the way to use this piece of evidence was limited solely to the jury's determination of whether appellant had access to a gun and thus whether he had an opportunity to commit the robbery. This the Court refused to do, and its vague charge on the "issue of identity" left that second jury, in this very close case, free to find that appellant was the robber because he was a person who carries guns, or because he was of bad character. The Court's charge effectively let the prosecution do the impermissible, that is to:

...introduce evidence of criminal character or generally of the commission of a crime on one occasion to prove the commission of a crime on another.

Ravich, supra, 421 F.2d at 1204.

The judgment herein must be reversed, both because of the abuse of discretion, in this particular case, in letting the gun in, and because of the vague and misleading charge on the gun.

POINT II

THE FAILURE OF THE GOVERNMENT TO DISCLOSE THAT SIMON AND BROWN HAD MET AND THAT GARRIS HAD ALSO BEEN PRESENT PERMITTED THE PROSECUTOR TO ARGUE A POWERFUL UNTRUTH IN HIS SUMMATION, TO WIT, THAT ONLY APPELLANT KNEW BROWN. THE MID-DELIBERATIONS STIPULATION FAILED TO CURE THIS INJUSTICE, FOR APPELLANT REMAINED DEPRIVED OF HIS RIGHTS TO DEVELOP AND CONFRONT THESE LATE-REVEALED FACTS AND HIS RIGHT TO ARGUE FROM SUCH FACTS.

Simon, called by the government, testified that he did not

know Brown, the owner of the getaway car. Brown, also called by the government, testified that he did not know either Simon or Carris. From this evidence, the prosecutor argued, very persuasively, that appellant was the only one who knew Brown and that, absent some incredible coincidence, Brown's car must have come to the robbers via appellant.

Although this argument was indeed powerful, it was apparently a lie, for the government knew, but had not disclosed to appellant, that Simon had twice met with Brown, and that Garris was also present on one of those occasions. The government knew this for quite a while, for Simon had told it to McLaughlin, the case agent, during the first trial. McLaughlin sat with Sagor, literally as Sagor's right hand man, throughout the second trial (T-II.890), and Simon also claimed that he had revealed these same facts to Sagor prior to the time the case went to the jury.

That the above-described failure to disclose evidence which was directly exculpatory to the government's theory of its case constitutes a violation of Brady v. Maryland, 373 U.S. 83 (1963), is virtually beyond dispute. United States v. Morell, 524 F.2d 550 (2d Cir. 1975); United States v. Hilton, 521 F.2d 164 (2d Cir. 1975); United States v. Seijo, 514 F.2d 1357 (2d Cir. 1975); Giglio v. United States, 405 U.S. 150 (1972); Mapue v. Illinois, 360 U.S. 264 (1959).

Indeed, it is really unnecessary to cite cases to this Court on this point, for the very obvious proof that the government realized its sin in not disclosing this information about Brown, Simon and Garris*, can be seen in Sagor eagerness and willingness to patch

* Quite obviously, the information should have been disclosed to appellant during the first trial.

up the record below with the mid-deliberation stipulation:

MR. SAGOR: I don't think there is any substance to any Brady motion, to begin with, but to eliminate any possible claim, I think I would be prepared to enter into that stipulation, to avoid any claim.

(T-II.1023)

Thus, the question before this Court really boils down to one of whether the mid-deliberations stipulation, entered into after the denial of appellant's motion for a mistrial, cured the harm brought about by the government's exploitation of its earlier Brady violation.

The answer must be that the mid-deliberations stipulation, which was all that the Court or the government were willing to allow at that point, could not and did not cure the problem, because the stipulation still left appellant deprived of his constitutional rights to confront that additional evidence, to develop that additional evidence, and, most important, to argue to the jury that the additional evidence undercuts the strongest argument which the prosecutor made in his summation. Herring v. New York, 422 U.S. 853 (1975).

There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial.

Herring, supra, 422 U.S. at ____.

Appellant's conviction, in this close case,* came at a trial where the government was able to argue a theory which was a lie, and, when the barest skeleton of the truth was finally stipulated to, it was too late for appellant to develop that truth or to argue from it.

* See POINT I, supra.

The judgment should be reversed and the indictment dismissed.*

POINT III

THE PROSECUTOR'S SUMMATION IMPROPERLY
SHIFTED THE BURDEN OF PROOF TO APPELL-
ANT ON THE ISSUE OF ALIBI.

Sagor argued to the jury:

You will note that there was no alibi presented
in this case --

(T-II.887)**

The effect of this argument was to shift the burden of proof to appellant, to make the jury wonder why appellant had not testified or why appellant had not produced some proof of an alibi.

Such a shifting of the burden of proof to a defendant in a criminal case clearly violates due process, as the Supreme Court recently reaffirmed in Mullaney v. Wilbur, 421 U.S. 684 (1975). See also, In Re Winship, 397 U.S. 358, 361 (1970); Speiser v. Randall, 357 U.S. 513, 526 (1958).

* See, United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) [Friendly, C.J.] ("We cannot, with proper respect for the discharge of our duties, content ourselves with yet another admonition; a reversal with instructions to dismiss the indictment may help translate the assurances of the United States Attorneys into consistent performance by their assistants.")

** It is clear that Sagor knew that such an argument was improper and unethical. See footnote on page 19 of this brief.

More specifically, imposing upon a defendant the burden of proving an alibi violates due process and is reversible error. Smith v. Smith, 454 F.2d 572 (5th Cir. 1972), cert. denied, 409 U.S. 885; United States v. Booz, 451 F.2d 719, 721-722 (3d Cir. 1971); Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968), cert. denied, 393 U.S. 1001.

In the instant case, the Court, after appellant's immediate objection to Sagor's alibi argument, told the jury:

Let us not talk about that at all. The jury will disregard that....
(T-II.887)

The above instruction was clearly insufficient to cure the damage done. The proper immediate instruction might have been one to the effect that the defendant has no such burden. The Court gave no such immediate instruction, and to give one later, after the summation was over, would have served only to remind the jurors of the gnawing alibi question which Sagor had raised and which could only be positively cured by the granting of a mistrial.

The prosecutor's other improprieties in summation all compounded the injustice done to appellant by the alibi argument. Sagor called appellant's counsel "an expert cross-examiner" frustrated by Simon's allegedly unassailable truthfulness (T-II.889); he suggested that Judge Bryan had believed Simon (T-II.895-6); and he made a very thinly veiled comment on appellant's not having testified (T-II.900-1). See, Chapman v.

California, 386 U.S. 18 (1967).

The totality of these improprieties, especially the alibi argument, should not be tolerated by this Court, especially in so close a case, where the first jury had hung, where the July 25 gun was used to inflame the jury (POINT I, supra), and where appellant was deprived of developing and arguing the exculpatory evidence which rebutted the government's strongest argument (POINT II, supra).

The judgment should be reversed and the indictment dismissed.

POINT IV

THE COURT ERRED IN NOT PROMPTLY RE-
VEALING TO COUNSEL THE CONTENT OF THE
JUROR'S NOTE AND IN NOT ANSWERING THE
JUROR'S INQUIRY.

On the afternoon of the second day of deliberations, the Court received a note from a juror and, without revealing its contents to counsel, ordered the note sealed.* Later that day, the Court asked counsel if they wanted the jury to continue its deliberations (T-II.1040-1). Appellant's counsel, not knowing what was in the note, agreed that deliberations should continue.

It was not until the following day that the Court, still keeping the note sealed, told counsel that the note was "with

* Counsel could only assume then that the note dealt with some unrelated personal matter or that it revealed the jury's vote.

regard to her state of mind, as it were, and asking for advice." Appellant's counsel responded:

Without knowing what is in her note, I cannot
comment too intelligently....
(T-II.1042)

The Court decided to answer the note by again giving an Allen charge, as it had done the previous day, before the arrival of the note.

Only after the verdict did counsel learn that the juror, in her note, had stated that she had a "strong reasonable doubt" and had asked the Court what she should do.

The Court erred in not promptly revealing to counsel the content of the note. United States v. Dellinger 472 F.2d 340, 380 (7th Cir. 1972). Prior to this particular note, the jury had already declared itself hopelessly deadlocked, and an Allen charge had already been read to it. If the Court had promptly made counsel aware of the content of the note, obviously appellant would not have consented to the continuation of deliberations, but would, instead, have either asked the Court to declare a hung jury or would have proposed to the Court a supplementary instruction on reasonable doubt as an answer to the juror's question. When a jury has questions, a Court should try, with the assistance of counsel, to formulate answers to those questions. United States v. Peterson, 513 F.2d 1133 (9th Cir. 1975); United States v. Bolden, 514 F.2d 1301, 1308-09 (D.C. Cir. 1975). But without knowing what is in a note, as appellant's counsel noted, counsel

"can't comment too intelligently."

Nor was the Allen charge responsive to the juror's question, which had come soon after an earlier Allen charge. Certainly, an Allen charge is not the answer to all possible questions:

Like dynamite it should be used with great caution, and only when absolutely necessary.

United States v. Flannery,
451 F.2d 880, 883
(1st Cir. 1971)

The Court's failure to reveal to counsel the content of the note and the Court's failure to respond to the juror's question, only served to compound the aforementioned errors, requiring reversal of the judgment herein.

POINT V

THE GUN, SEIZED INCIDENT TO APPELLANT'S ARREST, SHOULD HAVE BEEN SUPPRESSED, BECAUSE THE COMPLAINT/ AFFIDAVIT IN SUPPORT OF THE ARREST WARRANT DID NOT ESTABLISH PROBABLE CAUSE TO ARREST APPELLANT.

In his complaint/affidavit in support of an arrest warrant, Agent McLaughlin gave the following as sole "basis for deponent's knowledge":

1. Essentially, that the bank had been robbed.
2. Simon, indicted for this robbery, had identified one of the robbers in the bank surveillance photos as "Cecil Robinson."
3. One Gilbert Garris (the brother of the defendant Garris), who is not alleged to have been involved in the robbery, identified the same robber in the surveillance photo not as Cecil Robinson, but as "Merciful."*

* Please note that the above three paragraphs are not a quote, but are a paraphrasing by appellant's counsel.

Neither the complaint nor the warrant had a copy of that surveillance photo attached to it. The warrant authorized the arrest of a Cecil Robinson, and Detective Foster went out and arrested a Cecil Robinson. There is no evidence that Foster either had with him at the time of the arrest, or had earlier seen, the above surveillance photo. Nor, incidentally, is there anything in the complaint/affidavit to suggest that this particular Cecil Robinson could be found at Gouveneur Hospital.

The warrant was thus a general warrant for anyone named Cecil Robinson, since both the warrant itself and the complaint/affidavit in support of the warrant failed to include a copy of the surveillance photo. Without such a photo, the complaint/affidavit does not establish probable cause to arrest any particular Cecil Robinson, nor could any officer not in possession of such a photo execute the warrant consistent with the Fourth Amendment. Without that photograph, the complaint/affidavit fails to satisfy the requirement of an "...Oath or affirmation... particularly describing...the person...to be seized".

Appellant's motion (T-1.1a-10a) to suppress the July 25 gun should have been granted and the judgment should be reversed.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED
AND THE INDICTMENT DISMISSED OR,
IN THE ALTERNATIVE, A NEW TRIAL
BE ORDERED.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Jesse Berman", written in a cursive style.

JESSE BERMAN
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May, 1976.

